NO. 47469-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ADAM HOFLACK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Patricia Aitken, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS (CONT'D)

A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding Matthew Meyer's two prior juvenile theft adjudications for impeachment purposes.

2. The trial court denied appellant his right to confront the witness against him. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10).

3. The trial court erred in giving an instruction defining "necessary" which inadequately conveyed to the jury the law on self-defense. CP 97 (Instructions 12).[2]

4. The trial court erred in refusing to give appellant's proposed instruction defining "necessary" which adequately would have conveyed to the jury the law on self-defense. CP 80-81.[3]

5. The trial court erred in refusing to give appellant's proposed instructions which would have informed the jury that appellant's use of force was lawful if he had reasonable grounds to apprehend a design on the part of Matthew Meyer to commit the felony of harassment against appellant. CP 76-77, 78.[4]

Issues Pertaining to Assignments of Error

1. The state charged appellant with assaulting Matthew Meyer

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[2] Instruction 12 is quoted in its entirety in the statement of the case, infra.

[3] The proposed instruction is quoted in its entirety in the statement of the case, infra.

[4] The proposed instructions are quoted in their entirety in the statement of the case, infra.

with a deadly weapon, to wit: a baseball bat. Only Meyer and appellant were present when appellant hit Meyer with the bat. Meyer's version of the events directly conflicted with appellant's claim of self-defense, making Meyer's credibility central to the case. Did the trial court err in excluding Meyer's two prior juvenile theft adjudications for impeachment purposes, where the thefts would have been admissible had Meyer committed these as an adult, and where these clearly were "necessary for a fair determination of the issue of guilt or innocence?" ER 609(d).

2. Did the trial court violate appellant's right to confront the witness against him by prohibiting impeachment with Meyer's prior theft adjudications where these were relevant to Meyer's credibility and the state did not present a compelling state interest in excluding the evidence?

3. Did the trial court commit reversible error by refusing appellant's proposed self-defense instruction defining "necessary" and, instead, giving conflicting self-defense instructions which would allow the jury to conclude that flight was always a reasonable alternative to the use of force, contrary to the law on self-defense in Washington?

4. Appellant proposed an instruction which would have informed the jury that his use of force was lawful if he had reasonable grounds to apprehend a design on the part of Matthew Meyer to commit the felony of harassment against appellant. Where appellant presented sufficient evidence that he reasonably believed that Meyer intended to kill him, that appellant reasonably believed that there was imminent danger of such harm being

accomplished, and that appellant reasonably believed he used the degree of force necessary, did the trial court err in refusing the proposed instruction?

B. STATEMENT OF THE CASE

1. Procedural History

By amended information filed March 22, 1999, the King County Prosecutor charged appellant Adam Hoflack with first degree assault as follows:

> That the defendant ADAM F. HOFLACK in King County, Washington on or about March 7, 1999, with intent to inflict great bodily harm, did assault another and inflict great bodily harm upon Matthew Meyer;
>
> Contrary to RCW 9A.36.011(1)(c), and against the peace and dignity of the State of Washington.

CP 5.

On September 13, 1999, Hoflack's first trial resulted in a mistrial when the jury could not arrive at a unanimous decision. Supp. CP __ (sub 42A, Trial Minutes).

On August 3, 1999, the King County Prosecutor further amended the information to allege that Hoflack was armed with a deadly weapon when he committed the assault, to wit: a baseball bat. CP 11.

On May 18, 2000, Hoflack's second jury trial commenced, the Honorable Patricia Aitken presiding. 2RP 1.[5] The jury convicted Hoflack as

[5] This brief cites the transcripts as follows: 1RP - August 3, 1999; 2RP - May 18, 2000; 3RP - May 22, 2000; 4RP - May 23, 2000; 5RP - May 24, 2000; 6RP - May 25, 2000; 7RP - May 30, 2000; 8RP - May 31, 2000; 9RP - September 8, 2000; 10RP - September 19, 2000.

charged. CP 40, 41. The court sentenced Hoflack to 93 months of imprisonment, plus a 24-month deadly weapon sentence enhancement, for a total term of confinement of 117 months. CP 117-18.

2. Trial Testimony

Matthew Meyer was 18 years old when Hoflack's second trial began. 5RP 4. Meyer knew Hoflack through Marjory Kaufman. 5RP 5, 8. Meyer became Marjory's good friend in high school. 5RP 5. Marjory lived at her parents house where Meyer was a frequent visitor. 5RP 5. Meyer met Hoflack when he began dating Marjory and became a regular visitor at Marjory's parents' house. 5RP 5, 8. Meyer never developed a friendship with Hoflack because Meyer would leave whenever Hoflack came to visit Marjory. 5RP 8-9. Eventually, Hoflack moved into the Kaufman's home. 5RP 9.

About a week before the March 7, 1999 incident which resulted in Hoflack's assault charge, Meyer went to a party with his friend Michelle Everett. 5RP 9. Marjory and Hoflack also were attending the party. 5RP 9. Meyer testified that he and Michelle had been drinking and that he was drunk. 5RP 55, 58.

During the party, Michelle approached Marjory to pick a fight. 5RP 55. Michelle called Marjory a "bitch" so Hoflack went between the two women and pushed Michelle away from Marjory. 5RP 57. Meyer became angry when Hoflack pushed Michelle, so Meyer pushed Hoflack. 5RP 10. Meyer's friends then asked Hoflack and Marjory to leave the party. 5RP 11.

The following day, Meyer and Michelle got onto the bus where they

encountered Hoflack's younger brother, Wayne, who was with Marjory's younger sister, Andie. 5RP 12; 7RP 59. Andie testified that Michelle told Andie that she had "beat up" Marjory and that "all the people wanted to beat up [Hoflack]." 7RP 60. Meyer told Andie that "he was going to slit [Hoflack's] throat if [Hoflack] ever touched another one of his friends." 7RP 60. Michelle and Meyer then got off the bus. 7RP 61. The next day, Andie relayed to Hoflack what Michelle and Meyer had said on the bus. 7RP 61.

Meyer testified that he remembered getting on the bus with Michelle and encountering Andie, but that he could not remember making the threats. 5RP 12-14. Meyer only stated that he "could have" made the threats. 5RP 14. Meyer further testified that he did not carry knives because he did not "really have a reason . . . [he did not] need to be walking around with any knives." 5RP 7-8.

As to the events on March 7, 1999, Meyer testified that he happened to walk in front of Marjory's parents' house on the way to a friend's house in the area. 5RP 15. Meyer saw "them" in the yard in front of the house, but he did not talk to "them" because he was mad at "them." 5RP 17, 19. Hoflack called out to Meyer to come talk to him. 5RP 18.

Meyer stopped to talk to Hoflack. 5RP 18. According to Meyer, Hoflack said he was mad and wanted to "beat up" Meyer. 5RP 18. Meyer turned around and started walking away. 5RP 18. He then stopped again, turned around and told Hoflack that if he "messed with" any of Meyer's friends, Meyer would kill him. 5RP 18. Meyer turned his back to Hoflack, crossed the

street and began walking towards the recreation center. 5RP 19.

Meyer had his cigarettes and lighter in his coat pocket. 5RP 72. He stated that he stopped in the breezeway of the recreation center, took out a cigarette and began to light it, when he heard Hoflack call his name. 5RP 23, 31, 72, 82. On cross-examination, Meyer stated that it was possible that, when Hoflack called out, it appeared that Meyer had his hand in his coat pocket to draw a weapon. 5RP 79.

Meyer claimed that he remembered starting to turn around when Hoflack called to him, but he did not remember getting hit in the head. 5RP 24. Meyer next remembered becoming conscious as the medics were attending to him at the recreation center. 5RP 24. Meyer also remembered being in the hospital because of a head injury which required two operations to repair. 5RP 25-26.

Meyer testified that he was not carrying a weapon on March 7. 5RP 18-19. However, at the recreation center, the police had discovered a pearl-handled pen knife among the items in Meyer's coat pocket. 6RP 44. The police also found a pack of cigarettes at the recreation center about three feet away from a pool of blood. 6RP 48-49. However, the police did not find a cigarette that had been lit but not smoked. 6RP 56-57.

Hoflack testified that he became concerned after Andie told him what Meyer had said on the bus. 7RP 97. When Hoflack saw Meyer walking in front of the Kaufman house on March 7, Hoflack went to talk to him in an attempt to "resolve the situation." 7RP 97. As Hoflack was questioning

Meyer about his threats and about Marjory, Meyer threatened to kill Hoflack. 7RP 98. Hoflack then went into the house to get a bat out of his room. 7RP 98-99. Hoflack wanted to "prepare [himself]" in case Meyer tried to stab him to death. 7RP 98, 100. Hoflack stated that he feared an attack from Meyer because Meyer was known to carry knives and because Meyer had tried to "kill his [own] dad." 7RP 100.[6]

When Hoflack came back outside, Meyer was standing in front of the house. 7RP 100. Hoflack, who is right-handed, had the bat in his left hand, "halfway up" and "choking the bat." 7RP 99, 139. Meyer began walking away when Hoflack asked if Meyer really intended to kill him. 7RP 101. Meyer did not respond so Hoflack continued walking with Meyer, trying to engage him in conversation. 7RP 101.

Just before they reached the breezeway at the recreation center, Meyer put his hand in his coat pocket and turned to face Hoflack. 7RP 102, 105. They were standing about three and a half feet apart and it appeared to Hoflack that Meyer was pulling out a knife. 7RP 105-06. Believing Meyer was going to stab him, Hoflack stepped back and swung the bat with his left hand. 7RP 107.

Hoflack testified that he swung the bat once and only to stop Meyer from killing him. 7RP 107. Hoflack thought that if he had tried to run away,

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[6] Meyer testified that when he was 15 years old, he got into a fight with his father. Meyer threw a machete at the wall. 5RP 6. Meyer's father was not injured. 5RP 6. Meyer "spent some time in juvie for that" and all of his friends, including Marjory, knew about the incident. 5RP 6-7.

Meyer would have been able to stab him. 7RP 143. Although Meyer fell to the ground when Hoflack hit him, Meyer did not appear to be injured so Hoflack thought it would be safe to leave. 7RP 108, 145. Hoflack stood by Meyer for a second and then began quickly walking back to the Kaufman house. 7RP 108.

At the house, Hoflack told Marjory what had occurred at the recreation center. 7RP 109. They then went to the theater where Marjory worked to watch a movie. 7RP 109. Hoflack went to the theater because he was afraid that Meyer would come back to the house and the theater seemed to be a safe place. 7RP 109, 134, 145. After the movie, Marjory called home and learned the police were looking for Hoflack. 7RP 110. Hoflack returned to the Kaufman house and was arrested there. 7RP 110.

Hoflack further testified that he did not intend to injure Meyer. 7RP 116. He had followed Meyer because "no matter what, [Meyer] could have come back and killed [Hoflack] anytime." 7RP 118. Meyer was not bleeding when Hoflack left the recreation center. 7RP 123. Hoflack only later learned about Meyer's head injury. 7RP 116.

Detective Kittelson testified that he took a statement from Hoflack after his arrest. 6RP 106-08. Hoflack told Kittelson about the shoving incident at the party, the threats on the bus and Meyer's threat in front of the Kaufman house. 6RP 113-14. Hoflack had intended to diffuse the situation with Meyer when he stopped in front of the house. 6RP 113. However, Meyer threatened Hoflack, so Hoflack asked Meyer if he "needed to get his baseball bat." 6RP

114. When Meyer did not answer, Hoflack went into the house to get the bat. 6RP 114.

According to Kittelson, Hoflack further stated that when he came out of the house, Meyer was walking away. 6RP 114. Hoflack caught up with Meyer and told him: "If you want to kill me, now is your chance." 6RP 114. Meyer did not say anything and reached into his coat pocket so Hoflack hit him with the bat. 6RP 114. Hoflack also told Kittelson that he was very angry when he hit Meyer and that he regretted what he had done. 6RP 115.

Three neighbors witnessed the meeting between Hoflack and Meyer in front of the Kaufman house -- Seth Janson, Seth's wife, Stephanie, and Sorrel Nelson. Seth testified that he and Stephanie lived across the street from the Kaufmans. 4RP 18-19. Seth had seen Hoflack and Meyer at the Kaufman house many times. 4RP 19-20. On the afternoon of March 7, Seth and Stephanie were in front of their house working on the car. 4RP 20. At one point, Seth glanced up and saw Meyer walking down the street in front of the Kaufman house. 4RP 25. Hoflack came out of the house and yelled "hey" to Meyer. 4RP 26. Hoflack then walked up to Meyer and the two began talking. 4RP 28. Seth could not hear what they were saying. 4RP 28.

At first, Seth thought that Hoflack and Meyer were about to have a confrontation, but when they started talking Seth "figured that there was no confrontation at all." 4RP 29. As Hoflack began walking back into the house, Seth heard Meyer say: "If you mess with any of my friends, I'll kill you." 4RP 29-30, 49-51. Meyer then turned to walk away and Hoflack went into the

house. 4RP 30.

Seth next saw Hoflack come out of the house with a baseball bat in his hand. 4RP 31. Hoflack began following Meyer down the street. 4RP 32. Meyer and Hoflack both appeared to be angry. 4RP 32. Seth could see Hoflack talking to Meyer, but Seth could not hear what Hoflack was saying. 4RP 32.

According to Seth, Meyer did not turn around to look at Hoflack. 4RP 32-33. Seth could not remember where Meyer's hands were at that time, but thought that Hoflack was holding the bat in his right hand. 4RP 34, 71.

Seth lost sight of Hoflack and Meyer when they reached the recreation center. 4RP 34. At that point, they were walking almost side by side. 4RP 54. It appeared to Seth that "they were going to play baseball. They looked like a couple of friends walking side by side going to play baseball." 4RP 54.

About five minutes later, Seth saw Hoflack walking back to the Kaufman house. 4RP 45. Hoflack went inside and came back out with Marjory about two minutes later. 4RP 45. Hoflack and Marjory left in a van. 4RP 45.

Stephanie testified that she first noticed Hoflack and Meyer when they were standing in front of the Kaufman house outside the fence. 4RP 75. Hoflack and Meyer appeared to be arguing. 4RP 76. Stephanie heard Meyer say: "If you're around my friends anymore, I'll kill you." 4RP 77. Hoflack then went into the house and Meyer started walking down the street. 4RP 77.

When Hoflack came back outside, he had a bat in his left hand. 4RP

78. Hoflack was pointing the bat towards the ground as he followed Meyer down the street. 4RP 78-79, 89. According to Stephanie, if she would not "have known what was going on, [she] would have thought they were going to play ball together." 4RP 96. Stephanie further stated that "[t]hey looked like they were walking together, almost one behind another [sic]." 4RP 96.

Stephanie lost sight of Hoflack and Meyer when they reached the recreation center. 4RP 80. Because they both seemed calm at that point she "shrugged [her] shoulders saying, nothing is going to happen." 4RP 94. Five to ten minutes later, Hoflack returned to the Kaufman house, got into a van with Marjory and left. 4RP 81, 96.

Sorrel Nelson, the Janson's neighbor, also was outside working on her car during the afternoon of March 7. 6RP 4-6. Sorrel testified that she saw Seth and Stephanie looking across the street so she began paying attention to what was happening there. 6RP 6. Sorrel saw Hoflack and Meyer walking down the street. 6RP 7. Meyer was walking in front of Hoflack who was carrying a bat. 6RP 7. Sorrel could hear loud voices, but she was not sure if only Hoflack or both Hoflack and Meyer were talking. 6RP 9. Hoflack was not acting aggressively so Sorrel was not concerned about Meyer's safety. 6RP 15-16. When Sorrel lost sight of them, she "just kind of lost interest and went back to what [she] was doing." 6RP 9.

About five minutes later, Hoflack returned to the Kaufman house and left with Marjory. 6RP 11-12. Sorrel then heard sirens at the recreation center. 6RP 12. Sorrel and Seth walked there and saw medics attending to

Meyer who was on the ground. 6RP 13.

3. Meyer's Two Prior Juvenile Theft Adjudications

Prior to trial, Hoflack's attorney advised the court that she intended to attack Meyer's credibility with his two juvenile theft adjudications. 2RP 25-26.[7]

The state indicated to the court that the thefts were shoplifting incidents which had occurred in 1998 and 1999. 2RP 26. The state argued that the thefts were not admissible to impeach Meyer because his credibility was not at issue. 2RP 26-27. According to the state, "[Meyer's] credibility as to the factual scenario here [was] not the material issue in this case, . . . but in this case it [was] whether or not [Hoflack] acted in self-defense." 2RP 26.

Hoflack's attorney advised the court that Meyer's credibility was at issue because his testimony regarding the events leading up to the assault would be contradicted by three independent witnesses. 2RP 27. As an example, Hoflack's attorney cited Meyer's anticipated testimony that he did not know that Hoflack had followed him to the recreation center. 2RP 27-28. Hoflack's attorney expected that testimony to be contradicted by witnesses who thought Meyer had heard Hoflack. 2RP 27-28. Additionally, counsel anticipated that Meyer would deny that he told Andie on the bus that he was going to slit Hoflack's throat. 2RP 27.

The court stated that the thefts automatically would be admissible to impeach Meyer's credibility had he committed these when he was an adult.

[7] Hoflack was represented by two attorneys at trial. 2RP 1.

However, the court ruled that the thefts would not be admissible to impeach Meyer because "they [were not] necessary for a fair determination of guilt or innocence in this matter . . . ." 2RP 30.

4. The Jury Instructions

The court instructed the jury on the elements of first degree assault and the lesser included offense of second degree assault. CP 88-95. The court further instructed the jury on self-defense. CP 96-99. The self-defense instructions informed the jury, in relevant part, that the use of force was lawful "when used by a person who reasonably believes that he is about to be injured and when the force is not more than is necessary." CP 95 (Instruction 11).[8] The court gave the following definition of "necessary":

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 96 (Instruction 12).

The court also gave the jury the following "no duty to retreat" instruction:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

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[8] A copy of Instruction 11 in its entirety is attached hereto as an appendix.

CP 97 (Instruction 13).

Hoflack's attorney objected to Instruction 12 on grounds that the phrase "no reasonably effective alternative to the use of force appeared to exist" conflicted with Hoflack's "common law right not to retreat." CP 79, 80-81; 7RP 152-53. Instead, Hoflack's attorney had proposed the following instruction defining "necessary" which the court had refused (7RP 152-53):

> Necessary means that the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the defendant at the time.

CP 80-81.

Hoflack's attorney also had proposed a "no duty to retreat" instruction nearly identical to the court's as follows:

> It is lawful for a defendant who is in a place where he has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 79.

Additionally, Hoflack's attorney had proposed the following instructions:

> It is a defense to a charge of assault that the force used or attempted was lawful as defined in this instruction.
>
> The defendant's use of force against Matthew Meyer is lawful if either:
>
> (1) the defendant reasonably believed that he was about to be injured, or in preventing or attempting to prevent an offense against him, and when the force is not more than is

> necessary. The defendant may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to him, taking into consideration all of the facts and circumstances known to him at the time of and prior to the incident; or,
>
> (2) the defendant had reasonable grounds to apprehend a design on the part of Matthew Meyer to commit the felony of harassment against the defendant;
>
> The State has the burden of proving beyond a reasonable doubt that the force used or attempted by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 76-77.

> A person commits the crime of harassment when without lawful authority, he knowingly threatens to cause bodily injury immediately or in the future to another person and when he, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out.

CP 78.

In proposing those two instructions, Hoflack's attorney advised the court that RCW 9A.16.050 allowed a defense to homicide where the slayer had a "reasonable ground to apprehend a design on the part of the person slain to commit a felony" against the slayer and there was "imminent danger of such design being accomplished." CP 76-77; 7RP 158.

Hoflack's attorney argued that a person should not have greater protection by "killing another person in the course of a felony than they would simply assaulting a person in the course of a felony." 7RP 158. Accordingly, Hoflack should have the right to assault Meyer in self-defense because Meyer

had committed the felony of harassment by threatening to kill Hoflack. 7RP 158.

The court's Instruction 11 defining "lawful force" was almost identical to the first alternative definition of "lawful force" in Hoflack's proposed instruction. CP 95 (Instruction 11). However, the court refused to give Hoflack's proposed second alternative definition of "lawful force" which would allow Hoflack to assault Meyer in self-defense because of the harassment. 7RP 157.

The state argued in closing that self-defense was not available to Hoflack because he was the first aggressor. 8RP 14-15. However, if the jury was not convinced that Hoflack was the first aggressor, then the jury must consider that Hoflack used more force than was necessary. 5RP 18-20.

C. ARGUMENT

1. THE TRIAL COURT'S FAILURE TO ADMIT MEYER'S TWO PRIOR THEFT ADJUDICATIONS FOR IMPEACHMENT PURPOSES WAS REVERSIBLE ERROR.

Under ER 609(a)(2), an adult theft conviction is automatically admissible to impeach a witness's general truthful or untruthful character. State v. Ray, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991).[9] The crime of theft includes shoplifting. State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997) (citing State v. Ray, 116 Wn.2d at 545).

[9] ER 609(a)(2) provides in relevant part:

> For the purpose of attacking the credibility of a witness in a criminal . . . case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime . . . involved dishonesty or false statement, regardless of the punishment.

A juvenile theft adjudication generally is not admissible under the rule, but may be allowed in the court's discretion which is governed by ER 609(d):

> Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

A court abuses its discretion when its decision is "manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996), rev. denied, 130 Wn.2d 1025 (1997). As set forth below, the trial court abused its discretion when it refused to allow Hoflack to attack Meyer's credibility with his two prior juvenile theft adjudications.

Prior to trial, the state objected to admission of the thefts for impeachment purposes on grounds that "[Meyer's] credibility as to the factual scenario here is not the material issue in this case . . ., but in this case it's whether or not the defendant acted in self-defense." 2RP 26. The court correctly noted that Meyer's prior thefts automatically would be admissible for impeachment purposes had these been adult convictions. 2RP 29-30. However, the court ruled that the thefts were not "necessary for a fair determination of the guilt or innocence in this matter . . . ." 2RP 30.

Contrary to the state's representations and the court's ruling, Meyer's credibility was at issue because his testimony concerning Hoflack's attack directly conflicted with Hoflack's testimony on self-defense.

Meyer claimed that he was not carrying a weapon on March 7, that he did not know that Hoflack was following him to the recreation center, and that Meyer only heard Hoflack call his name as Meyer was reaching into his coat for a cigarette. Meyer further claimed that he could not remember being hit with the bat. 5RP 18, 23-24.

In contrast, Hoflack testified that he knew Meyer carried knives and had thrown a machete at his father, that Meyer knew Hoflack was following him to the recreation center, and that Hoflack believed that Meyer was reaching into his coat pocket for a knife in order to stab Hoflack to death. 7RP 100-102, 106-08.

As Meyer's version of the events contradicted Hoflack's claim of self-defense, the jury should have been allowed to assess Meyer's testimony in light

of his dishonesty as reflected in his theft adjudications. As stated by the Washington Supreme Court in Ray,

> . . . The act of taking property is positively dishonest . . . [t]he sole purpose of impeachment evidence is to enlighten the jury with respect to the [witness's] credibility . . . . This purpose is met by allowing admissibility of prior convictions evidencing dishonesty . . . .

116 Wn.2d at 545 (quoting State v. Brown, 113 Wn.2d 520, 551-52, 782 P.2d 906 (1989)).

Meyer's shoplifting adjudications were "necessary for a fair determination" of Hoflack's guilt or innocence. Accordingly, the court abused its discretion under ER 609(d).

An erroneous ruling under ER 609 requires reversal when, ". . . within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Ray, 116 Wn.2d at 546. Because Hoflack and Meyer were the only witnesses testifying as to the events at the recreation center, it cannot be said, within reasonable probabilities, that the verdict would have been the same had the jury been enlightened as to Meyer's credibility. Hoflack's assault conviction must be reversed and his case remanded for a new trial.

2. HOFLACK WAS DENIED HIS RIGHT TO CONFRONT THE WITNESS AGAINST HIM.

Under the Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10), an accused has the right to confront the witnesses against him. Davis v. Alaska, 415 U.S. 308, 315, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974); State v. Connie J.C., 86 Wn. App. 453, 456, 937 P.2d 1116 (1997); State v. McDaniel, 83 Wn. App. at 185. A confrontation clause violation constitutes a manifest constitutional error which may be raised for the first time on appeal. State v. Connie J.C., 86 Wn. App. at 456; State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992).

> . . . . '[M]anifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. 'Affecting' means having an impact or impinging upon, in short, to make a difference. A purely formalistic error is insufficient.

State v. Lynn, 67 Wn. App. at 346. Manifest error is determined by a four-part

analysis:

> . . . First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

67 Wn. App. at 345 (citations omitted); accord, State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). In determining whether a claimed constitutional error is supported by plausible argument, this Court must "preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding." State v. WWJ Corp., 128 Wn.2d at 603.

The right of cross-examination is included in the right of the accused to confront the witnesses against him. State v. Temple, 5 Wn. App. 1, 4, 485 P.2d 93 (1971). When the court does not give the accused reasonable latitude during cross-examination, the court effectively denies the accused his right to confrontation. 5 Wn. App. at 4. As stated previously, the court erred in prohibiting Hoflack from impeaching Meyer's credibility with the theft adjudications. This confrontation clause violation "suggests a constitutional issue." See State v. Lynn, 67 Wn. App. at 345 (error raised for the first time on appeal suggested a confrontation clause violation; therefore, the error had to be examined to determine if it was manifest). Moreover, this error had "practical and identifiable consequences" at trial because Meyer's version of events conflicted with Hoflack's claim of self-defense and the jury was not allowed to fairly appraise Meyer's credibility.

The right of confrontation is subject to the following limitations: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the state's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. State v. McDaniel, 83 Wn. App. at 185 (citations omitted).

Where evidence of a witness's lack of credibility bears on facts of consequence to the determination of the action, the evidence is admissible. See, e.g., McDaniel, 83 Wn. App at 186-87 (identity of person or persons who assaulted Graham was a fact of consequence to the determination of the action;

Graham's false testimony in a related civil proceeding was highly relevant to her credibility at McDaniel's assault trial; McDaniel, therefore, was entitled to confront Graham with evidence of the prior false testimony). As stated previously, Meyer's theft adjudications were relevant to his credibility on the issue of whether Hoflack attacked in self-defense, a fact of consequence to the determination of the action. The state then must demonstrate a compelling state interest in excluding the evidence. 83 Wn. App. at 185, 187.

The state might argue that a juvenile adjudication cannot be used for impeachment purposes because it is not a criminal conviction. However, this does not mean that a witness's juvenile adjudications are never admissible. Temple, 5 Wn. App. at 3. When, as was the case with Meyer, "the witness is a not a criminal defendant, different considerations prevail. No constitutional or statutory immunity is at stake. What is at stake is the defendant's constitutional right to confront the witnesses against him." 5 Wn. App. 3-4. Accordingly, the state did not have a sufficiently compelling interest to exclude the thefts and the court erred in denying their admission.[10]

The violation of Hoflack's rights under the confrontation clauses is presumed prejudicial. McDaniel, 83 Wn. App. at 187.[11] The state bears the burden of proving the error was harmless under the "overwhelming untainted evidence test". Under the test, this Court looks only to the untainted evidence to decide if it is so overwhelming that it necessarily leads to a finding of guilt. 83 Wn. App. at 187-88.

Without Meyer's testimony, the evidence shows that Hoflack feared Meyer would kill him, that Hoflack had the bat for protection and that Meyer knew Hoflack was following him to the recreation center. Hoflack hit Meyer with the bat believing that Meyer was reaching for a knife in order to stab Hoflack to death. Accordingly, the untainted evidence does not lead to a finding of guilt, but rather supports Hoflack's claim of self-defense. Hoflack's assault conviction must be reversed and his case remanded for a new trial. See McDaniel, 83 Wn. App. at 188 (without Graham's testimony, the untainted evidence was not so overwhelming as to show McDaniel was her attacker;

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[10] See also, Davis v. Alaska, 415 U.S. at 315-16 (error to prevent defense from inquiring into the juvenile record of state's witness).

[11] See also Temple, 5 Wn. App. at 4 (" . . . Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.") (quoting Alford v. United States, 282 U.S. 687, 692, 75 L. Ed. 624, 51 S. Ct. 218 (1930)).

thus, reversal was required).

3. THE TRIAL COURT'S FAILURE TO ADEQUATELY INSTRUCT THE JURY ON THE LAW OF SELF-DEFENSE WAS REVERSIBLE ERROR.

It is well-settled that a jury may find the defendant acted in self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996) (citations omitted). The jury must put itself in the shoes of the defendant in determining reasonableness from all the surrounding facts and circumstances as they appeared to the defendant. 128 Wn.2d at 900 (citations omitted).

> Jury instructions must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard manifestly apparent to the average juror.

128 Wn.2d at 900 (citations omitted). If a jury instruction can be read so as to modify another instruction, the instructions become internally inconsistent and, therefore, ambiguous. State v. Irons, 101 Wn. App. 544, 553, 4 P.3d 174 (2000). Instruction 12 in this case conflicted with Instruction 13, creating an inconsistent statement of the law on self-defense. In instructing on self-defense, the court informed the jury that Hoflack could use force if he "reasonably believe[d] that he [was] about to be injured and when the force [was] not more than necessary." CP 95 (Instruction 11). Instruction 12 provided that "necessary" meant that "under the circumstances as they appeared to [Hoflack] at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended." CP 96 (Instruction 12).[12] However, Instruction 13 stated that if Hoflack had reasonable grounds for believing he was being attacked, he had a right to "stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat." CP 97 (Instruction 13). Instruction 13 accurately states the law in Washington that one who is assaulted in a place he has a right to be has no duty to retreat. State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984).

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[12] Instruction 12 is derived from RCW 9A.16.010(1) where "necessary" is defined.

Defense counsel advised the court that the phrase "no reasonably effective alternative to the use of force appeared to exist" in Instruction 12 negated Hoflack's right to stand ground and defend his attack as stated in Instruction 13. To correct this error, defense counsel had proposed the following instruction instead:

> Necessary means that the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the defendant at the time.

CP 80-81. Unlike the court's Instruction 12, Hoflack's proposed instruction would have precluded the jury from concluding that flight was a reasonable alternative to the use of force.

Although not directly on point, State v. Wooten, 87 Wn. App. 821, 945 P.2d 1144 (1997), rev. denied, 134 Wn.2d 1021 (1998), illustrates the error in allowing the jury to conclude that flight is a reasonable alternative to the use of force. Tausha Wooten and Shawntee Stringer were both dating Robert Stark. 87 Wn. App. at 823. Stringer's cousin, Shaylee Hansen, drove Stringer to Wooten's house to look for Stark. 87 Wn. App. at 823. Wooten and Hansen got into a fight outside the house and Hansen threatened to kill Wooten, saying she was going to "smoke" her. 87 Wn. App. at 823. Wooten then went into the house and Hansen and Stringer got back into the car. 87 Wn. App. at 823. Wooten came outside with a gun, walked up to the car, pointed the gun through the driver's side window and fired. 87 Wn. App. at 823-24. The bullet hit and killed Stringer. 87 Wn. App. at 822, 824. Hansen did not believe that Wooten was trying to actually shoot one of them. 87 Wn. App. at 824.

Wooten claimed that she knew Hansen was involved with gangs and

carried guns and that Hansen's threat caused great concern. 87 Wn. App. at 824. Wooten said she went back outside to smooth over the situation so that she would not have to fear retaliation. 87 Wn. App. at 824. Wooten was not familiar with guns but she brought Stark's gun outside in case she needed to defend herself. 87 Wn. App. at 824. Wooten fired a warning shot into the car when she saw Hansen reach for what Wooten thought was a gun. 87 Wn. App. at 824.

At trial, Wooten raised the claim of self-defense. 87 Wn. App. at 824. The court instructed the jury that self-defense justified a homicide when "'the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer . . . at the time of . . . the incident.'" 87 Wn. App. at 824 (omissions in original). Force was defined as necessary when "'no reasonably effective alternative . . . appeared to exist and . . . the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time.'" 87 Wn. App. at 824 (omissions in original). The court denied Wooten's request for a "no duty to retreat" instruction. 87 Wn. App. at 824.

On appeal, Wooten argued that the trial court's refusal to give that instruction prevented her from fully arguing self-defense and relieved the state from its burden of disproving self-defense. 87 Wn. App. at 825. This Court agreed stating:

> . . . A reasonable jury could have believed Wooten's testimony that (1) Hansen's threat meant that she would have been shot in the near future, (2) she thought that it was

> necessary to return outside to diffuse the situation, and armed herself to do so out of fear of Hansen, and (3) based upon Hansen's actions at her car, Wooten reasonably believed that Hansen was about to shoot her. But without a "no duty to retreat" instruction, the jury could have concluded that self-defense was nevertheless not applicable because flight was a reasonably effective alternative to Wooten's use of force. Because such a conclusion was possible, the failure to give this instruction was error.

87 Wn. App. at 826. Accordingly, this Court held that the error was not harmless and reversed Wooten's conviction. 87 Wn. App. at 826.

The Wooten facts are nearly identical to those here. A reasonable jury could have believed that (1) Hoflack knew that Meyer carried knives and had thrown a machete at his father; (2) Hoflack reasonably feared an attack because of this and because Meyer had assaulted Hoflack at the party and twice threatened Hoflack's life; (3) Hoflack had armed himself with the bat for protection; and (4) based on Meyer's actions at the recreation center, Hoflack reasonably believed Meyer was about to stab him. Hoflack's testimony was bolstered by other witnesses who testified that Meyer had threatened Hoflack's life on two occasions and who contradicted Meyer's claim that he did not know Hoflack was following him as they approached the recreation center. Moreover, Meyer denied he was carrying a weapon, but the police had discovered a knife in Meyer's coat pocket. Under Instruction 12, the jury could have concluded nevertheless that self-defense was unavailable to Hoflack because flight was a reasonably effective alternative to his use of force. See also State v. Williams, 81 Wn. App. 738, 744, 915 P.2d 738 (1996) (in the absence of a "no duty to retreat" instruction, the jury could have believed the

defendants, but erroneously concluded that they used more force than necessary because they did not use the obvious and reasonably effective alternative of retreat).

Where, as here, jury instructions are internally inconsistent, resulting in a misstatement of the law, "the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant unless the error can be declared harmless beyond a reasonable doubt." State v. Irons, 101 Wn. App. at 559. As demonstrated by Wooten, the error here was not harmless and reversal is required. 101 Wn. App. at 560.

4. THE TRIAL COURT'S FAILURE TO INSTRUCT ON APPELLANT'S PROPOSED SECOND ALTERNATIVE DEFINITION OF LAWFUL FORCE WAS REVERSIBLE ERROR.

Hoflack proposed a second alternative definition of "lawful force" which would inform the jury that Hoflack's use of force upon Meyer was lawful if Hoflack "(2) had reasonable grounds to apprehend a design on the part of [Meyer] to commit the felony of harassment against [Hoflack] . . . ." CP 766-77. The proposed instruction is based on RCW 9A.16.050 which provides in relevant part:

> Homicide is . . . justifiable when committed . . . :
>
> > (1) In the lawful defense of the slayer . . . when there is a reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer . . . and there is imminent danger of such design being accomplished[.]

The slayer's use of force is legitimate under the statute where the slayer (1)

subjectively believes that the person slain intends to commit a felony, and or do some great personal injury; (2) subjectively believes there is imminent danger of such harm being accomplished; (3) both such beliefs are reasonable based on the facts known to the slayer; and (4) the slayer used the degree of force that a reasonable person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into account all the facts known to the slayer. WPIC 16.02 (revised); State v. LeFaber, 128 Wn.2d at 899; State v. Janes, 121 Wn.2d 220, 233-42, 850 P.2d 495, 22 A.L.R.5th 921 (1993); State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); State v. Penn, 89 Wn.2d 63, 66-67, 568 P.2d 797 (1977); State v. Corn, 95 Wn. App. 41, 52, 975 P.2d 520 (1999).

An accused is entitled to a "justification" instruction when he presents "some evidence" of these elements. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998); State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); State v. Janes, 121 Wn.2d at 237. The threshold is low, as the evidence need not even rise to the level creating reasonable doubt. Janes, 121 Wn.2d at 237: (citing State v. McCullum, 98 Wn.2d at 488); State v. Adams, 31 Wn. App. 393, 395-96, 641 P.2d 1207 (1982). When determining whether "some evidence" supports the instruction, the court must view the evidence in the light most favorable to the defense. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997) (citing State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984); State v. McCullum, 98 Wn.2d at 488-89). This Court reviews this question of law de novo. Walker, 136 Wn.2d at 771-72; Janes, 121 Wn.2d at 238 n.7.

Hoflack proposed the alternative definition on grounds that Meyer threatened to kill Hoflack which constitutes the felony of harassment under RCW 9A.46.020(1)(a)(i):

> (1) A person is guilty of harassment if:
>
> (a) Without lawful authority, the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened . . .; and
>
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out . . .

> (2) A person who harasses another is guilty . . . of a class C felony if . . . the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened . . . .

In other words, because of Meyer's threats, Hoflack feared that Meyer would cause great personal injury or death. Hoflack subjectively believed that great personal injury or death was imminent because Meyer had made the threat on the bus and then appeared in front of Hoflack's home, again repeating the threat. Hoflack knew that Meyer had thrown a machete during an altercation with his father and that Meyer carried knives. Indeed, Meyer had a knife in his coat pocket on the day in question. Furthermore, Meyer's assault on Hoflack at the party demonstrated that Meyer was capable of attacking Hoflack without hesitation. See State v. Janes, 121 Wn.2d at 241 ("Imminence does not require an actual physical assault. A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out.") (citation omitted).

Hoflack believed that Meyer was reaching for a knife to stab Hoflack to death. Hoflack further believed that his use of force was reasonable and necessary to prevent the stabbing. In short, Hoflack presented more than "some evidence" to entitle him to the proposed instruction. Although Hoflack did not kill Meyer, the court should have given the instruction on the grounds aptly indicated in defense counsel's footnote to the proposed instruction:

> It would be unreasonable to believe that [Hoflack] would have self-defense [had] he killed Meyer in the course of preventing a felony of harassment, but when Meyer lives [Hoflack] 'loses' the self-defense. It would be better then for a person to always kill a person committing a felony rather than attempt to simply

disable the felon.

CP 76.

The due process clauses of the state and federal constitutions guarantee the accused the right to an adequately instructed jury. U.S. Const. amend. 14; Const. art. 1, § 3; State v. McCullum, 98 Wn.2d at 488; State v. Adams, 31 Wn. App. at 396-97. Jury instructions are inadequate when they incorrectly state the law, are misleading, or prevent the accused from arguing the theory of the case supported by the evidence. State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997); State v. Acosta, 101 Wn.2d at 623-25. Where the trial court erroneously fails to instruct on "justification," the error is presumed prejudicial. Likewise, the error should be presumed prejudicial here. The state then must establish that the error was harmless beyond a reasonable doubt. State v. McCullum, 98 Wn.2d at 497-98.

The state cannot satisfy its burden. Without the proposed instruction, the jury erroneously could have concluded that Hoflack's use of force was lawful only when Hoflack believed he was about to suffer an actual physical assault and, thus, unlawful in response to a mere threat. See, e.g., State v. Janes, 121 Wn.2d at 241 (a threat of impending bodily injury can support self-defense when there is a reasonable belief it will be carried out).

The trial court erred in failing to give Hoflack's proposed instruction. Because the error was prejudicial, this Court should reverse Hoflack's conviction and remand for a new trial. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997); State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 714 (1995).

D. CONCLUSION

For the reasons set forth above, appellant requests that this Court reverse his first degree assault conviction and remand his case for a new trial.

DATED this _____ day of July, 2001.

Respectfully submitted,

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_____

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